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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LAW OFFICE OF DON DETISCH, Plaintiff and Respondent, v. DAN WOOLLEY et al., Defendants and Appellants.	D055281 (Super. Ct. No. 37-2007-00067292-CU-BC-CTL)

APPEAL from a postjudgment order of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Affirmed as modified.

Plaintiff and respondent, the Law Office of Don Detisch (Plaintiff), sued its former clients, defendants Dan Woolley and Tina Woolley (Defendants) for unpaid legal fees, and obtained a default judgment against them. The judgment included contract damages, interest, and attorney fees and costs. Defendants each brought motions to set aside their defaults, which were denied, as was reconsideration. (Code Civ. Proc., §§ 473, 1008; all statutory references are to the Code of Civil Procedure unless otherwise indicated.)

Defendants appeal the ruling that denied their motions for relief from default, as well as related rulings, contending that the superior court abused its discretion in not allowing them a trial on the merits. They argue they were excusably mistaken when they did not avail themselves of the opportunity allowed them by the court, in a previous hearing, to remove the defaults, file their answers and respond to discovery, since they believed they were justified in continuing to pursue alternative dispute resolution (bar association fee arbitration) at the time. (§ 473, subd. (b).)

Further, Defendants contend the default judgment impermissibly includes an additional award of $3,110 attorney fees associated with obtaining the judgment, since the complaint did not expressly plead an entitlement to fees, nor was any noticed motion for fees brought. (§§ 580, 585, subd. (d).)

In our preliminary review of the record on appeal, we determined there were potential problems with appealability of some of these related orders, and requested that the parties respond with letter briefs on the issue. We then issued an order noting the parties agreed "that this court lacks jurisdiction to review the default judgment entered on September 17, 2008, and the May 22, 2009 order denying defendants' motion for reconsideration." Accordingly, Defendants were directed to limit their briefing on appeal to issues concerning the March 20, 2009 order denying the motion to vacate judgment. Whether this court lacks jurisdiction over the appeal entirely, as contended by Plaintiff (for arguable untimeliness of the motion under § 473), was deferred to this merits panel.

We have now reviewed the record and conclude the motions were properly brought before the trial court, and the default judgment is subject to review for its legal

sufficiency. The trial court did not abuse its discretion in denying the motions for relief, because Defendants did not show any excusable mistakes occurred, but rather that they made conscious decisions to forego the previous, court-ordered grant of relief from default. However, we agree with Defendants that the default judgment is excessive only insofar as it separately awards additional attorney fees ($3,110), without support in the complaint. We affirm the judgment as modified only to delete that particular attorney fees costs item.

FACTUAL AND PROCEDURAL BACKGROUND

A. Complaint; Defaults; Extension of Time to Answer

We set forth only those facts that are relevant to the issues on appeal concerning the denial of the motions to vacate the default judgment. In the complaint, filed May 24, 2007, Plaintiff alleged that it was entitled to damages for breach of contract or on common counts for unpaid legal fees that Defendants incurred when Plaintiff represented them in a real estate matter. The complaint attached the attorney-client fee agreement and exhibits regarding Defendants' notification of the right to arbitrate the fee issues. The prayer of the complaint seeks the sum of $21,028.10 with interest, and costs of suit. Proofs of service in the file show Defendants were personally served June 15, 2007.

In July 2007, Defendants applied for a waiver of court fees and filed their answer. However, the fee waiver request was denied and the filing of the answer was voided by the clerk in September 2007.

On October 11, 2007, Plaintiff responded to standard court notices concerning the need for progress in the case, and sought the clerk's entry of Defendants' defaults, but the

request was rejected as incomplete. Plaintiff served discovery on Defendants, but they did not respond. Plaintiff brought a motion to compel discovery responses, which was set for hearing December 14, 2007.

In the interim, Plaintiff filed another request for entry of default, accompanied by an amended proof of service filed November 5, 2007. The clerk's worksheet (default/proof of service sendback) originally indicated the request for default could not be processed, due to the lack of an original amended proof of service and updated mailing, but those defects were corrected and the clerk entered the default November 5, 2007.

At the December 14, 2007 discovery hearing, Defendants appeared in propria persona, admitting they knew their answer had been stricken for nonpayment of fees, but they did nothing, because they were hoping to go to fee arbitration instead. The court and Plaintiff specifically told Defendants that Plaintiff would not arbitrate. The court then told Defendants the default could be undone if they paid fees and filed an answer within two weeks, or January 11, 2008, but they again responded that they preferred to go to arbitration. The court notified Defendants that if they did not file the answer and pay the filing fee within two weeks, the default would stand and they would have lost the case.

No answer was filed, no discovery answers were provided, and no fees were paid. No formal reentry of the November 5, 2007 defaults was evidently made. However, the court noticed a routine order to show cause hearing for June 27, 2008, regarding the failure to file a judgment, and the minutes for that hearing show that Plaintiff's attorney conferred with the court clerk about what paperwork was needed to move the case

forward. On July 18, 2008, Plaintiff filed an application for default judgment, supported by points and authorities, an attorney declaration lodging supporting documents, and declarations attaching the proof of service and requesting an award of attorney fees and costs. The attorney declaration explained the method for calculating prejudgment interest, based on the $21,028.10 past due fees, with 10 percent interest due on overdue invoices, amounting to $3,537.14, which did not include the effort for collection. Additionally, the collection efforts totaled $3,110 attorney fees plus costs of $400.

B. Default Judgment; Motions to Vacate Default Judgment; Reconsideration

On September 17, 2008, the court entered the judgment by default based on the written declaration and attached materials. (§ 585, subd. (d).) In addition to the damages and prejudgment interest prayed for in the complaint, the court ordered attorney fees in the amount of $3,110, and $400 in costs. Plaintiff also filed a memorandum of costs after judgment.

On November 14, 2008, Defendants each filed their own motion to have the default judgment set aside. (§ 473.) Defendants argued they had a mistaken belief that when they filed their request for fee arbitration, the court proceedings became stayed, and they therefore believed they no longer had to comply with the court order of December 14, 2007 that allowed them to file an answer upon payment of fees.

Plaintiff opposed the defense motions, arguing no excusable mistakes had been shown, and the defaults and default judgment were supported by the record. Plaintiff relied on the same exhibits that were submitted in support of the judgment application, and has provided them as lodged exhibits here.

At the March 20, 2009 hearing on their motion, Defendants appeared in propria persona, arguing they were confused about why their answer was again not accepted by the clerk in December 2007, when they filed their motion, and also, that they previously understood the fee arbitration materials from the local bar association as meaning that the court proceedings would be stayed, if they continued to pursue arbitration.

The court denied the motion, first observing that under section 473, "[c]ourts are empowered to relieve a party, 'upon such terms as may be just . . . from a judgment, dismissal, order or other proceedings taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect.' " Based on declarations or other evidence showing mistake, inadvertence, surprise, or excusable neglect, relief is discretionary. (§ 473, subd. (b).) (The court also observed that the proposed answer appeared to be lacking, although that portion of the ruling was retracted at later reconsideration proceedings, as will be explained, since there was some showing the proposed answer was provided.)

On the merits, the court determined that relief under section 473, subdivision (b) must be denied "because Defendants have failed to demonstrate mistake, inadvertence, surprise or excusable neglect. Defendants seek relief based on their alleged mistaken belief that the stay in these proceedings resulting from their filing of arbitration stayed the Court's December 14, 2007 ruling. At the December 14, 2007 hearing, the Court ordered Defendants to pay the required fees and to file their answer no later than two weeks from that date; otherwise a default would be entered against them. Instead, Defendants sought to arbitrate their claims. However, according to the Court transcript of the hearing,

Defendants knew that Plaintiff was not going to arbitrate. The Court and Plaintiff specifically told Defendants that Plaintiff would not arbitrate. Therefore, Defendants' belief that they still could arbitrate the claims is not well taken. Further, the Court specifically told Defendants to file an answer within two weeks or the default would be entered against them. Nonetheless, Defendants chose not to file an Answer, and continued to pursue arbitration. Thus, Defendants' failure to comply with the Court's order to file an answer to avoid a default was not a mistake, it was a conscious decision made by Defendants which does not warrant granting the relief sought. Therefore, the motion to vacate and set aside default judgment is denied on this basis as well."

Next, Defendants brought a motion to reconsider, based on their claim that they had paid their first appearance fees when their motions to set aside the default judgment were filed, and they again attempted to file their answer, but were not allowed to do so. This motion to reconsider was denied for lack of a showing of new or different facts. (§ 1008.)

C. Appeal; Jurisdiction, Briefing and Order

On June 10, 2009, Defendants filed notices of appeal from the default judgment and associated orders on their motions. As already stated, this court allowed letter briefing and then issued an order clarifying that the issues on appeal would be limited to those concerning the March 20, 2009 order denying the motion to vacate the default judgment, and also whether this court may generally lack jurisdiction over the appeal, due to the timing of the motion.

DISCUSSION

I

RULES OF REVIEW

This appeal seeks reversal of the order denying relief from the default judgment. A claim for relief from default may raise the grounds stated in section 473 to support an order setting aside the default (i.e., mistake, inadvertence, surprise or excusable neglect), or it may be based, in the nature of collateral attack, upon alleged voidness of the resulting judgment. (*Dill v. Bergquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441 (*Dill*); *In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, 883, fn. 8; 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 206, pp. 811-812.)

Such a motion to set aside a default is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse of discretion, the trial court's order granting the motion will not be disturbed on appeal. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854; *Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 619-620.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

The predominant inquiry here is whether the record supports the trial court's exercise of discretion to deny relief from default. First, however, we will address Defendants' arguments that challenge the procedural correctness of the defaults entered,

and the legal soundness of the judgment concerning the separate attorney fees award, as costs.

II

AUTHORIZATION FOR DEFAULT AND EXTENT OF RELIEF AWARDED

In analyzing the denial of relief from default, a threshold issue is whether the statutory conditions authorizing entry of the default were satisfied. Defendants first seem to claim the default entry is unsupported, as a matter of law, because there was an earlier unsuccessful attempt to enter the default on October 11, 2007, and the clerk's worksheet (default/proof of service sendback), dated November 5, 2007, originally indicated the request for default could not be processed, due to the lack of an original amended proof of service and updated mailing. However, the file shows the amended proof of service and mailing was supplied and the clerk entered the default November 5, 2007.

Moreover, when the court offered Defendants the opportunity to have the existing defaults set aside in connection with the discovery motion, Defendants did not take any action within the time allowed, and there was no need for the court or the clerk to reenter the same defaults, of which Defendants had adequate notice.

We are mindful that the issues on appeal are limited to the propriety of the March 20, 2009 order denying the motion to vacate the default judgment, and whether this court may lack jurisdiction over the appeal in general. Under section 473, Defendants' motions for relief should have been filed within six months of the November 5, 2007 clerk's entry of the defaults. The time period specified in section 473 begins to run when the default is suffered or judgment is entered, not when the party

learned of it. (See, e.g., *Dill, supra*, 24 Cal.App.4th 1426, 1441.) Here, the motions were filed November 14, 2008, after the September 17, 2008 default judgment was issued.

In the letter brief, Plaintiff incorrectly contends that no appellate review is possible due to Defendants' untimely filing of their statutory motion in the trial court. However, review of the March 20, 2009 order denying relief from default may properly encompass review, for legal sufficiency, of the relief awarded in the underlying default judgment. (See 9 Witkin, Cal. Procedure, *supra*, Appeal, § 361, pp. 416-418; *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 495 (*Becker*); *People ex rel. Lockyer v. Brar* (2005) 134 Cal.App.4th 659, 666-669.) Defendants are arguing that the trial court, in ruling on their motion, erroneously failed to recognize that the attorney fees portion of the default judgment was legally unsupported, due to lack of pleading, noticed motion, or statutory authority.

Section 585, subdivision (c) sets forth the procedure for the plaintiff to apply to the court for the relief demanded in the complaint. The statute expressly requires that the court shall not render judgment in the plaintiff's favor for any relief that exceeds "the amount stated in the complaint . . . ," although it may award relief "as appears by the evidence to be just." (§ 585, subd. (c).)

Under section 580, a plaintiff cannot obtain recovery from a defaulted defendant that exceeds the prayer of the complaint. "It is well settled that a default judgment outside the scope of the demand is in excess of jurisdiction, and is subject to collateral attack. [Citations.] However, if a default judgment is only partially void for being excessive, an appellate court will strike the excess and affirm the judgment as to the valid

amount of recovery. [Citation.]" (6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, § 149, p. 585.)

We now inquire whether the default judgment comports with statutory and jurisdictional limitations. When a defendant is in default, this failure "to answer admits only facts that are well pleaded. [Citation.] If the complaint fails to state a cause of action or the allegations do not support the demand for relief, the plaintiff is no more entitled to that relief by default judgment than if the defendant had expressly admitted all the allegations. Such a default judgment is erroneous, and will be reversed on appeal." (6 Witkin, Cal. Procedure, *supra*, Proceedings Without Trial, § 183, p. 622.) Damages awarded in a default judgment may be set aside where they are unsupported by sufficient evidence (or if they are so excessive as to shock the conscience of the court, which is not the case here). (*Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1150.)

Here, the complaint sought an award of damages, interest, and costs, but it did not expressly request an attorney fees award, such as work in connection with an application for a default judgment (which would admittedly have been somewhat unusual). Although Defendants claim Plaintiff should have separately brought a noticed motion for such a fee award, it is difficult to square that argument with their defaulted status, since they presumably would have been unable to respond. In any case, upon Defendants' defaults, Plaintiff became entitled to prove entitlement to the relief sought in the complaint, which did not include attorney fees.

In *Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470, 1474-1475 (*Wiley*), this court accepted a due process challenge to a default attorney fees award, as exceeding the

amount pled in the complaint. The superior court had awarded that plaintiff his attorney fees as costs, in a default judgment. However, the complaint never alleged any contract authorizing attorney fees nor did it demand attorney fees, so that attorney fees award was unjustified. We explained: "If Wiley was entitled by statute or contract to attorney fees, that fact should have been pleaded in the complaint and a demand included in the prayer. [Citation.] In *Becker, [supra],* 27 Cal.3d at page 495, the Supreme Court reversed an attorney fee award in a default judgment because the complaint did not pray for attorney fees. Here Wiley's complaint did not allege entitlement to attorney fees." (*Wiley, supra,* at p. 1474.) Nor did the plaintiff in *Wiley* request attorney fees as costs in the request to enter default. Accordingly, the pleadings and proof were insufficient to support the default attorney fee award.

Here too, Plaintiff did not request these $3,110 attorney fees as costs in the complaint. They were requested in the application to enter default and costs memorandum, even though the Judicial Council form that was utilized characterizes such fees as available, without necessity of a court determination, "only if" there is a contractual or statutory basis, and otherwise, it states that a noticed motion is required. None was brought here, and the form request did not sufficiently support this default award of $3,110 attorney fees. However, entitlement to costs was pled, so adequate notice was given to Defendants that they might be exposed to the $400 costs attributable to the collection efforts.

Moreover, Plaintiff has essentially conceded in its respondent's brief that a contractual or statutory basis for this separate fee award is lacking, unless it might be

viewed as discovery sanctions for fees incurred because of Defendants' bad faith actions or tactics. (§§ 128.5, 128.7.) Plaintiff concludes, "if this Court deems that these fees of [$3,110] are not appropriate in this fact context, then in keeping with *Wiley, [supra]*, 223 Cal.App.3d 1470, Respondent would request that the default judgment be modified by eliminating the [fees award] and affirming the remainder of the default judgment." Plaintiff properly requested costs on appeal. These are well taken requests and must be granted, since this separate award of fees exceeds the prayer. (*Wiley, supra*, 223 Cal.App.3d 1470, 1474.)

However, there is no evident defect in the interest award in the judgment. The attorney declaration explained the method for calculating prejudgment interest, based on the $21,028.10 past due fees, with 10 percent interest due on overdue invoices, amounting to $3,537.14, which did not include the effort for collection. The interest sum in the prescribed form directly follows the damages amount upon which it was calculated, and precedes the separate attorney fees item, and appears proper.

III

DISCRETIONARY RELIEF FROM DEFAULT

To argue abuse of discretion in denying relief, Defendants merely complain that the trial court incorrectly evaluated their declarations when it found that their failure to file an answer was not a mistake. They contend no substantial evidence supports the trial court finding that they were not seriously confused or mistaken when they evaluated their default status, in light of their proposed private arbitration alternatives.

When the experienced trial court analyzed the showing Defendants had made about their entitlement to relief from default, it had the ability to evaluate the reasonableness and credibility of the respective showings on the motions, and it was not required to give credence to Defendants' versions of the facts. The court was aware of the history of the case since it was filed, throughout the discovery problems, and it made a generous effort to allow Defendants to obtain conditional relief from default, even though they were not successful in that respect, or did not choose to do so. The important policy of promoting resolution of cases on the merits had to yield to the natural consequences of Defendants' conduct, even in light of their status in propria persona.

Even after Defendants were given personal notice by the court of the newly imposed January 11, 2008 deadline to respond to discovery and to file an answer, and that date passed, Defendants continued to adhere to their own personal belief systems about the proper procedures (pursuing private fee arbitration), and they did nothing to protect their own interests in the matter, in case they might be and were mistaken. No adequate showing was made that Defendants objectively or subjectively were prevented by anything that Plaintiff did or the court did from taking appropriate action, nor could Defendants show that the position they took was reasonable, when it is objectively evaluated.

In light of all the circumstances of the case as disclosed by this record, we cannot find that the trial court abused its discretion in denying Defendants the requested relief from default, and as modified, the default judgment will stand.

Finally, we do not find it necessary to decide on Plaintiff's informal contention that this appeal is frivolous and should have been dismissed, as being taken solely for purposes of delay. (§ 907; Cal. Rules of Court, rule 8.276; see *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-651 [an appeal may be deemed frivolous on objective or subjective basis].) Although Defendants' fundamental theories of relief are unsupported, the merits of the issues have required some attention and there is no need to apply those objective or subjective tests. (*Ibid.*)

DISPOSITION

The order and underlying default judgment are modified on appeal by striking the default judgment amount of $3,110 attorney fees, with the balance to stand, and as so modified, the order and default judgment are affirmed. Plaintiff and Respondent to recover its ordinary costs on appeal.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.